IN THE SUPREME COURT

OF THE UNITED STATES

October Term, 1978

NO. 78-1275

BARRY RINN and ALEX SELVA, Petitioners,

vs.

THE UNITED STATES OF AMERICA

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NO.

BARRY RINN and ALEX SELVA, Petitioners,

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THE UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States.

BARRY RINN and ALEX SELVA, the petitioners herein, pray that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled case on November 9, 1978, petition for rehearing having been denied on December 18, 1978, entry of the mandate of the Circuit Court having been recalled and stayed for a period of thirty (30) days from January 18, 1979,

pending the within application for a writ of certiorari.

OPINION BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 586 F. 2d 113 (1978) and is reproduced in Appendix A hereto. The opinion affirmed judgements of conviction of petitioners for violations of Title 21 U.S.C., sections 846, 841 (a)(1) and Title 18 U.S.C., section 2. Petitioners were tried in the United States District Court for the Central District of California by a jury, and there was no opinion of that Court.

JURISDICTION

The judgement of the United States Court of Appeals for the Ninth Circuit affirming the trial court convictions (Appendix A, infra.) was entered on November 9, 1978. A petition for rehearing was denied on December 18, 1978. The order of the Circuit Court denying the petition for rehearing is printed in Appendix B hereto. On January 18, 1979, the Circuit Court issued its order recalling and staying entry of its mandate for a period of thirty (30) days from date of the order pending Petitioners' application to this Court for a writ of certiorari. Said order of the Circuit Court recalling and staying entry of its mandate is printed in Appendix C hereto.

Jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTIONS PRESENTED

1. Did the court below err in holding that defense counsel was provided with handwritten notes of a prosecution witness in a timely manner during trial, and in so holding, did it further err in failing to reach the federal question whether such notes were "statements" within the purview of the Jencks Act (18 U.S.C., Section 3500) as construed in United States v. Carrasco, 537 F. 2d 372 (9th Circuit, 1976) and United States v. Johnson, 521 F. 2d 1318 (9th Circuit, 1975)? In so failing to reach the question and in failing to hold that the witness's handwritten notes were statements required to be provided to the defense under the Jencks Act, have the petitioners been deprived of the benefits and safeguards of the Act, and have they been denied their Sixth Amendment right under the United States Constitution to confront witnesses against them?

2. Did the court below err in holding that, despite the fact that three successive government prosecutors concededly had represented to defense counsel that certain tape recordings would not be used as evidence at trial, the representations did not bind the government to withhold the evidence and use of the evidence did not constitute government misconduct? Did the court below further err in impliedly holding

that one week's notice to defense counsel of the government's intention to use the recordings was adequate to allow the defense to electronically examine the recordings, which the government concedes were of poor quality, and to prepare a defense version? Did the court below further err in holding that, despite case law to the contrary, proper foundation was laid and adequate precautions were taken to render the recordings - generally bad in quality and unintelligible in places - admissible at trial? Were the defendants at trial denied thereby fundamental due process guaranteed by the Fifth Amendment to the United States Constitution, namely, proof beyond a reasonable doubt based on sufficient and competent evidence?

3. Was the trial court's refusal to grant the defense one continuance, when the defense had caused no previous delays, a prejudicial abuse of discretion resulting in a denial of due process, especially in light of the fact that the continuance was requested because (1) the government violated shortly before trial numerous representations that certain tape recording evidence would not be used at trial, and defense counsel needed adequate time to prepare a defense to such evidence, and (2) the government at time of trial had not complied with its stipulation for discovery of evidence in its possession and only furnished required information to the defense at a time too late for counsel to make adequate use of same, or during actual cross-examination of the prosecution witness.

4. Did the trial court rule incorrectly with regard to a defendant's inculpatory statement made to a government investigator and government informer by admitting the statement, over objection of defense counsel who had no prior knowledge of it, despite the fact that the government's use of the statement violated its stipulation for discovery? Since use of the inculpatory statement constituted the only corroboration of the elements of the crime by an eyewitness other than the informer, was its admission into evidence prejudicial error? Did suppression and use of the statement constitute government misconduct?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment VI

"In all criminal prosecutions, the accused shall enjoy the right. . . to be confronted with the witnesses against him . . . ."

Amendment V

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

STATUTE INVOLVED

The statute involved is the Jencks Act, codified at 18 U.S.C., Section 3500. The relevant provisions are found in subsections (b), (d), and (e). Because these provisions are lengthy, their pertinent text is set forth in Appendix D hereto.

STATEMENT OF THE CASE

1. Proceedings in United States District Court.

On October 6, 1976, Barry Rinn and Alex Selva, petitioners herein, were arrested by agents of the United States Department of Drug Enforcement Administration and by agents of the Downey Police Narcotics Division, and were subsequently indicted for violations of 21 U.S.C. Section 846, 21 U.S.C. Section 841(a)(1), and 18 U.S.C. Section 2 in a seven count indictment in the United States District Court for the Central District of California.

On July 26, 1977, after two prior continuances, neither of which were the result of defense requests, a pretrial hearing was held, the Honorable Laughlin E. Waters, Judge of the United States District Court for the Central District of California presiding. At this hearing, defense counsel addressed himself to tape recordings made by a government investigator of alleged conversations between the defendant Rinn and an informant. Notwithstanding the fact that defense counsel were repeatedly promised by three different government prosecutors assigned to the case that these tape recordings would not be used at trial, the prosecution sought to renege on its representations and only shortly before trial indicated its intent to use them.

Defense counsel urged the trial court to rule that the tapes were inadmissible, or in the alternative, to grant the

defense a short continuance to enable thorough testing of the tapes by qualified experts. At the crux of the defense motion was the prosecutions representations from the outset of the criminal proceedings until one week before trial that the tapes would not be used, and the fact that the tape recordings were of extremely poor quality, and unintelligible in many places. The substance of these taped conversations formed a critical part of the prosecution's case and thus were crucial to proving the guilt of defendants.

The defense motion for continuance was also based on the fact that the government had flagrantly breached the stipulation by both sides regarding informal discovery and had failed to produce documents and information contained in the stipulation including an accurate past criminal record of the key government informant, and an accounting regarding rewards, reimbursements or promises made to the informant, a photograph depicting a material scene relevant to the trial, and a defendant's inculpatory statement in the possession of the government, the latter two items of information only coming to light during cross-examination by the defense. Both the motion to exclude tape recordings as evidence, and the motion for a continuance were denied. The prosecution was allowed to submit into evidence not only the partially unintelligible tapes, but also the prosecution's transcripts of same, while defense counsel was neither afforded time to submit the tapes to electronic

scrutiny and enhancement nor to prepare a defense version.

On July 27, 1977, jury trial commenced. The tapes were first played for the jury during direct examination of the government informant, and at the same time transcribed copies which had been prepared by a government clerk from handwritten notes of the government investigator, were supplied. After the government investigator had testified with respect to the tapes and his handwritten transcription, the defense requested that all these notes be supplied, and the trial court ordered the prosecution to furnish the notes to the defense. It is evident from the transcript that the defense was not furnished the notes until the case was concluded and the jury deliberations had begun. The government concedes in its brief on appeal to the Circuit Court below that the notes were not supplied, but contends that the government had no obligation to do so under the Jencks Act (Appendix D herein).

During the course of the trial, defense counsel moved for a dismissal of the indictment both orally and in a written motion on the following grounds:

(a) That the prosecution breached its stipulation for discovery and delayed the disclosure of the informant's past criminal record and rewards and promises made to him;

(b) That information regarding the informant's past criminal record was incomplete and inaccurate when it was eventually provided to the defense;

(c) That the prosecution reneged on promises not to use faulty tapes at trial;

(d) That the prosecution intentionally suppressed material photographs;

(e) That the prosecution deliberately failed to disclose a defendant's statement as was required by the government's own stipulation.

The motion was denied.

The jury returned verdicts of guilty against Selva on three counts and against Rinn on four counts. Rinn was acquitted on two counts. Sentence was imposed as to both on September 12, 1977.

2. Proceedings in the United States Court of Appeals.

The petitioners herein appealed their convictions to the United States Court of Appeals for the Ninth Circuit. The matter was scheduled for oral argument, and defense counsel requested 30 minutes time in order to clarify certain portions of the record. Both sides on appeal stipulated to one continuance of the

appearance for oral argument, and thereafter the matter was taken off calendar and the Court prepared its opinion without having heard oral argument.

Said opinion, which is reproduced in Appendix A hereto, affirmed the judgement of the District Court.

REASONS ADVANCED FOR GRANTING THE WRIT

I

Contrary to assertions of both the appellants and the appellee in their briefs, and without clear substantiation from the record, the circuit court below held that defense counsel was provided with handwritten notes of a prosecution witness in a timely manner at trial. In so holding the court erred in failing to reach the federal question whether such notes were "statements" within the purview of the Jencks Act (18 U.S.C. Section 3500) - it being clear that such notes are statements within the meaning of the act - and petitioners have been denied thereby the benefits and safeguards of the act, and have been denied their Sixth Amendment right to confront witnesses against them.

It was strongly contended on appeal that defense counsel was never during trial provided with copies of a government investigator's handwritten notes subsequent to the testimony of the

investigator regarding the notes. Counsel for the government on appeal conceded this point in appellee's brief, and confined its argument to the contention that the notes were not Jencks Act material. Thus, both parties to the appeal agreed that the notes were not supplied to defense counsel in time for cross-examination, but the parties differed as to the character of the notes in relation to the Jencks Act. The court below, however, apparently on the basis of that portion of the record set out in footnote 1 of the Opinion (Appendix A herein) concluded that the notes were tendered to defense counsel in a timely manner. Of interest is the fact that the exact same colloquy quoted in the first part of footnote 1 to the Opinion (up to and including the words of the trial court "All right. We can arrange that.") was cited by appellee in its brief as standing for the proposition that the trial court was "suggesting" thereby that the government make the notes available. Solely on the basis of the record, the meaning of which is unclear at best, and without benefit of oral argument, the Circuit Court below held that it need not construe the Jencks Act in terms of the facts of this case. If it had reached the Jencks Act question, however, as it clearly should have, the Court below would have run squarely into the opinion in United States v. Johnson, 521 F. 2d 1318 (9th Circuit, 1975) which held that "notes and reports" of agents of the government who testify for the government, made in the course of a criminal investigation, may be subject to inquiry

under the Jencks Act, and that the notes are producible even where it appears that the entire contents of the notes are included in a document which was turned over to the defense (i.e., in context of the instant case, the government clerk's mechanically produced copy of the notes). In the instant case the Circuit Court below would also have run squarely into conflict with United States v. Carrasco, 537 F. 2d 372 (9th Circuit 1976) which, following the rationale and underlying basis of Johnson, supra, strongly admonished the government on the importance of the defendant's right to receive statements akin to the notes in the case at issue, and held that non-production of same constituted reversible error.

This Court should grant certiorari in order to make certain that the procedures followed and rulings made in the trial court with respect to production of the government investigator's notes did not depart from the accepted and usual course of judicial proceeding as annunciated by the above-cited precedents of the Ninth Circuit Court of Appeals.

II

This Court should grant certiorari to consider whether the prior representations of three separate government prosecutors that certain tape recording evidence would not be used at trial reaches the level of an agreement or promise binding on the government and implicates in the event of breach, established federal doctrine

relative to prosecutorial misconduct. This Court should grant certiorari to consider whether foundational requirements and cautionary instructions utilized at trial and approved on appeal, with respect to tape recording evidence were not in conflict with federal case law.

The Opinion of the Court below (Appendix A herein) dismisses the issue of prior representations of the government respecting its intention not to use certain tapes as evidence by concluding that such representations cannot be deemed to reach the level of an agreement binding on the government. This Court should grant certiorari to consider the important question whether, between professionals, and especially between fellow practitioners in the legal profession, such representations should be accorded equal stature with more formal agreements, and whether breach should call into operation well established sanctions, including suppression of the evidence or dismissal of the indictment, for government misconduct in a prosecution.

The Circuit Court below held that in light of the rationale in Turner (cited in the Opinion, Appendix A herein) the foundational requirements and cautionary instructions utilized by the trial court for admission of tape recordings were adequate to insure the sufficiency and reliability of the evidence. It was contended strongly on appeal by petitioners herein, however, that such

foundational requirements and cautionary instructions were inadequate, and coupled with the fact that defense counsel was not afforded time to electronically examine the poor quality tapes and prepare a defense version, the tapes should have been excluded from evidence. The appellants below relied on Bryant and Smith (cited in footnote 2 to the Opinion, Appendix A herein) as well as on United States v. Onori, 535 F. 2d 938 (5th Circuit 1976) in support of their assignment of error. Because of the increasingly frequent use, especially by prosecutors, of tape recordings as evidence in federal and state cases, resolution of the apparent conflicts in the above cited cases is important, and this Court should grant certiorari to establish what foundational requirements and procedures in this area are necessary to insure sufficiency and reliability of this type of evidence consistent with due process.

III

The Circuit Court below clearly was in error in holding that refusal of the trial court to grant one defense-requested continuance was a proper exercise of judicial discretion when such continuance was sought as a direct result of the government prosecutor's breach of prior representations regarding tape recording evidence, and as a direct result of the government breach of its stipulation for discovery.

The facts advanced by defense counsel

to support his motion for continuance made at time of trial are detailed elsewhere in this Petition, primarily in the Statement of Facts. Under the facts presented, the refusal of the trial court to grant a short continuance, upheld on appeal as a proper exercise of discretion, so far departs from the accepted and usual course of judicial practice, and so fundamentally raises questions of due process, that an exercise of this Court's power of supervision is strongly indicated.

IV

The trial court should have excluded a defendant's inculpatory statement made to a government investigator and government informer since the government intentionally withheld the statement before trial, even though disclosure was required by the terms of its stipulation for discovery.

As the record reflects, defense counsel, by way of informal discovery, had requested from the prosecution all statements to be used at trial. Although written reports containing certain statements were furnished, a critical statement by Selva was not so furnished and was only learned of during the trial and in front of the jury. The statement attributed to Selva was incriminatory and highly prejudicial since it became the only corroboration of cocaine possession by the defendant by an eyewitness other than the informant.

This alleged statement by Selva was known by the prosecution far in advance of the trial, as the record reflects, and suppression of the statement clearly violated the above-mentioned discovery agreement, constituted government misconduct, and resulted in surprise and extreme prejudice to defendants at trial.

This Court should grant certiorari to review this instance of government misconduct at trial, because of the serious nature of this assignment of error, and because the Circuit Court below did not treat suppression of the statement from the standpoint of intentional breach of the stipulation for discovery and because, in failing to hold that the statement should have been suppressed or at least its admission into evidence delayed pending defense counsel's scrutiny of its circumstances and content, the Court below seems to be taking a position contrary to established federal law respecting the consequences of government prosecutorial misconduct.

CONCLUSION

For all the foregoing reasons, the within petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Court of Appeals, East, Senior District Judge, sitting by designation, held that: (1) trial court did not err in submitting transcripts of tape recordings to jury subject to cautionary instruction that tape recordings, not transcripts, were controlling; (2) trial court did not err in refusing to grant continuance requested on first day of trial; (3) trial court did not err in permitting detective to testify concerning certain statements made to him by key government witness who was available at trial and subject to cross-examination and (4) Government's failure to disclose inculpatory statement made in presence of government agents did not constitute reversible error.

Affirmed.

1. Criminal Law ⇐627.6(4)

Contention that Government's failure to provide defendants with copies of detective's handwritten notes used in preparing transcript of relevant tape recordings constituted violation of Jencks Act was without merit where Government timely tendered notes for defense inspection and use during cross-examination of detective but tender was not accepted and notes were not utilized by defense. 18 U.S.C.A. § 3500(b).

2. Stipulations ⇐1

Pretrial verbal exchanges among counsel to the effect that tape recordings would not be used as evidence did not rise to level of actual agreement binding on Government, particularly since defense counsel was informed a week before trial of Government's intention to introduce tapes in evidence, defense had been in possession of tape recordings for approximately six months and defense counsel admitted he realized he did not have promise from Government not to use recordings.

3. Criminal Law ⇐1169.1(10)

District court did not commit reversible error in submitting tape recordings and Government's prepared transcripts thereof to jury subject to instruction that transcripts were to be used only as aid in following tapes and that tape recordings, not transcripts, were controlling.

UNITED STATES of America, Plaintiff-Appellee,

v.

Barry RINN and Alex Selva, Defendants-Appellants.

No. 77-3339.

United States Court of Appeals, Ninth Circuit.

Nov. 9, 1978.

Rehearing Denied Dec. 18, 1978.

Defendants were convicted in the United States District Court for the Central District of California, Laughlin E. Waters, J., of conspiracy, possession with intent to distribute a controlled substance and aiding and abetting, and they appealed. The

4. Criminal Law ⇐586, 1151

Motion for continuance directs itself to sound discretion of trial court and appellate court will not disturb trial court's ruling unless an abuse of discretion is shown.

5. Criminal Law ⇐589(1)

Failure to grant continuance on ground of Government's failure to provide copies of prior criminal record of government witness was not error where record established that criminal record of witness was supplied by Government and known to defense in adequate time to fully and extensively cross-examine witness on subject. Fed.Rules Crim.Proc. rule 16(a)(1)(C), 18 U.S.C.A.

6. Criminal Law ⇐700

Information concerning "favor or deals" made to key government witness merely goes to credibility of witness and need not be disclosed prior to witness testifying.

7. Witnesses ⇐395

Where defense counsel, to impeach credibility of key government witness, opened the subject of witness' prior statement to detective concerning identity of his source of cocaine, prosecutor's cross-examination question to detective about witness' prior identification of his source of cocaine was proper rehabilitation and properly allowed over hearsay objection. Fed.Rules Evid. rule 801(d)(1), 28 U.S.C.A.

8. Criminal Law ⇐1171.1(1)

Government's failure to disclose pretrial inculpatory statement made by defendant in presence of two government agents did not constitute reversible error where defendant, at time he made statement, was not under interrogation and was unaware that other participants in conversation were government agents. Fed.Rules Crim.Proc. rule 16(a)(1)(A), 18 U.S.C.A.

Carl A. Capozzola, of Moore & Capozzola, Torrance, Cal., for defendants-appellants.

Theresa A. Kristovick, Asst. U. S. Atty., Los Angeles, Cal., for plaintiff-appellee.

Appeal from the United States District Court for the Central District of California.

Before ANDERSON and HUG, Circuit Judges, and EAST,* Senior District Judge.

EAST, Senior District Judge:

The defendants Rinn and Selva appeal their respective judgments of conviction and sentences to custody, fine and special parole for violations of the provisions of 21 U.S.C. § 846 (conspiracy), 21 U.S.C. § 841(a)(1) (possession with intent to distribute a controlled substance), and 18 U.S.C. § 2 (aiding and abetting).

Rinn and Selva were jointly indicted under a seven count indictment. A jury found Rinn guilty on four counts and Selva guilty on three counts.

We note jurisdiction and affirm.

FACTS:

The pertinent facts gleaned from the testimony of the informant Larry Neuberger are:

Neuberger met Rinn in New York during 1968. During that year, Neuberger moved to California and began trafficking in narcotics for Rinn. In 1969, he was convicted and sentenced to California penal custody for dangerous drug trafficking. After release in 1972, he borrowed $3,000 from Rinn and moved to Indiana. In 1976, he returned to Los Angeles where he rejoined Rinn and agreed to again enter drug trafficking for Rinn in order to clear the $3,000 indebtedness. Thereafter, on a number of occasions, he received narcotics for sale from Rinn and Selva. During one such transaction late in July, 1976, he agreed to sell cocaine to Detective John D. Abbey of the Downey, California Police Department, who was working in an undercover police capacity. Neuberger obtained cocaine from Rinn and Selva and sold two ounces thereof

* Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

to third parties and one ounce to Abbey for $1,600. Neuberger was arrested by Abbey late in July, 1976. Thereafter Neuberger agreed with Abbey to cooperate in the investigation of cocaine trafficking with the understanding that Abbey would do all he could to help Neuberger with his pending narcotics charge. Neuberger was released from custody and on September 3, 1976 he met with Rinn, at which time Neuberger was wearing a body radio transmitter. Neuberger and Rinn arranged for a sale of cocaine, with the pickup through the "stash" (the person holding the narcotics) Selva. The radio signals from Neuberger's body transmitter were tape recorded by police officers. Further meetings with Rinn for sales of cocaine were recorded on October 4 and 6, 1976. At the meeting on October 6, Abbey purchased cocaine from Rinn and Selva. Selva was subsequently arrested.

Abbey's testimony corroborated the testimony of Neuberger to the extent of his participation and established that throughout the investigation the Drug Enforcement Administration of the United States was cooperating with the Downey Police Department and had financed the investigation.

PRETRIAL PROCEEDINGS IN THE DISTRICT COURT:

On July 26, 1977, the day scheduled for trial, the District Court held a pretrial hearing at the joint request of the Government and the Defense with respect to the Government's stated intention to introduce portions of the tape recorded conversations between Rinn and Neuberger. The Defense challenged the intelligibility of the tapes and the accuracy of the Government's prepared transcript thereof.

Defense counsel also requested a 30-day continuance on the grounds that they had not adequately reviewed the tapes because they had been informed by three different Assistant United States Attorneys who had handled the case that the tapes would not in fact be used at trial. The trial prosecutor did not inform the Defense of the Government's intention to utilize the tapes until the week before trial. Further, defense counsel claimed that they had not received a complete arrest record of the informant Neuberger nor any report of the promises or compensation he had received in exchange for his cooperation and testimony.

The District Court denied the motion for a continuance, noting that the case was a relatively old criminal matter and that defendants were in possession of Neuberger's arrest record. Additionally, the District Court ordered that prior to the time the informant was to testify, defendants were to be informed of any inducements Neuberger had received in exchange for his testimony.

With respect to the tape recorded conversations, the District Court found that the Defense had been apprised of the Government's intention to introduce them at trial by both the Government's trial memorandum as well as telephonic communication by the Government's trial prosecutor the week prior to the commencement of the trial. The District Court also found that the Defense had been in possession of the tapes for many months and had made no effort to analyze them.

The District Court also heard testimony from Abbey, who had conducted the surveillance operation involving the defendants and had prepared a written transcript of the tapes. Neuberger testified that he had listened to the tapes of the conversations in which he had participated and believed that the transcript accurately identified who was speaking. He identified the conversation attributed to him and to Rinn as accurate and said that he believed the tapes accurately reflected the conversations.

After carefully listening to the tapes, Judge Waters ruled that adequate foundation had been laid. The tape recordings were probative and intelligible, however often with some difficulty. Although one tape was partly unintelligible, the unintelligible portions were not sufficient to defeat its probative value as a whole. The District Court concluded that the tapes were admissible and further stated that with respect to the transcripts, a cautionary instruction would be given to the jury as to the primary use of the tapes and that the transcripts would be removed from the jury upon completion of playing the tapes.

ISSUES ON REVIEW:

We construe the decisive issues on review to be:

1. Whether it was reversible error for the Government to fail to produce Abbey's handwritten notes used in preparing a transcript of the tape recordings.

2. Whether the District Court erred by placing the transcript of the tape recordings to the jury subject to a cautionary instruction that it was the tape recordings, not the transcript, which were controlling.

3. Whether the District Court erred in refusing to grant a continuance requested on the first day of trial.

4. Whether the District Court erred in permitting Detective Abbey to testify concerning certain statements made to him by Neuberger, who was available at trial and subject to cross-examination by the Defense.

5. Whether the Government's failure to disclose an inculpatory statement made by Selva prior to trial constituted reversible error.

DISCUSSION:

Issue 1:

It developed during the trial and before final cross-examination by defense counsel that Abbey initially listened to the tapes and took rough, handwritten notes. It appears that the transcript of the tape recordings was prepared with the help of these notes. The transcript was compared with a playing of the tape recordings at the pretrial hearing. Rinn and Selva contend that failure to provide them with copies of the handwritten notes constitutes a violation of the Jencks Act (18 U.S.C. § 3500(b)), entitling them to a reversal of their convictions. They argue that the Government had been ordered to hand over such notes after Abbey testified and, further, that their failure to receive such information until the end of trial, after all testimony in the case had been given, prejudiced their right to confrontation and cross-examination of Abbey with respect to the accuracy of the transcript.

For the reasons later stated, we do not reach the issue of whether the rough handwritten notes made by Abbey upon listening to the tape recordings are "statements" within the purview of the Jencks Act as rationalized by *United States v. Carrasco*, 537 F.2d 372 (9th Cir. 1976), and *United States v. Johnson*, 521 F.2d 1318 (9th Cir. 1975).

[1] It is not clear from the record whether the Defense made proper demand for the handwritten notes as either Jencks Act material or Defense's belief of exculpatory material. Nevertheless it is crystal clear that the Government timely tendered the handwritten notes for the Defense's inspection and use during cross-examination.[1] For reasons known only to defense

1. During the presentation of the Government's case in chief, the following colloquy took place with respect to the Government's obligation, if any, to provide the defense with Abbey's rough, handwritten notes of the tapes:

"THE COURT: Do you see any reason why those [handwritten notes of Abbey], however, should not be turned over to [defense counsel] at this point, aside from the fact that there was a failure to make a proper motion?

PROSECUTOR: No, your Honor, I don't. I have no objection to his having those notes.

THE COURT: All right.

PROSECUTOR: I believe that I, in fact, have most of them in my possession here.

DEFENSE COUNSEL: Before we receive them, your Honor, I would like to have the officer testify that they are his full and complete notes.

THE COURT: All right. We can arrange that."

Later the following was adduced through defense counsel's cross-examination of Abbey:

"Q Do you have a copy of your handwritten notes that you made at the time that you first copies [*sic*] down those those tapes?

A Yes.

counsel, the tender was not accepted nor were the notes utilized by the Defense in further cross-examination. The Government could do no more. We believe no rule requires the Government to put Jencks Act or exculpatory materials into defense counsel's pocket after counsel declined to make use of what was tendered. We conclude this issue to be without merit.

Issue 2:

It appears that during the period between the date of the return of the indictment on or about October 27, 1976, and the date of trial, July 26, 1977, a succession of three Assistant United States Attorneys were consecutively in charge of the prosecution. Defense counsel was supplied with copies of the tape recordings in January of 1977. Thereafter each of the Assistant United States Attorneys, including the trial prosecutor, told defense counsel that the Government would not use the tape recordings as evidence. Thereafter and approximately a week before trial, the trial prosecutor orally and in writing advised defense counsel that it was the intention of the Government to offer the tape recordings into evidence. The Defense claims they had not prepared a transcript or thoroughly reviewed the tapes on the basis of a "gentlemen's agreement" with the prosecutor that the tapes would not be used at trial, and furthermore, that the numerous errors in the Government's prepared transcript and the inaudible nature of the tapes rendered the transcript and tapes untrustworthy and inadmissible.

> Q Are there any other handwritten notes on this case?
> A Yes, there are.
> Q Where are those other handwritten notes on this case?
> A I also have those sitting on counsel table. But I think you've got them, also.
> Q Handwritten notes?
> A Yes. On the case itself.
> Q What handwritten reports do you have other than the original notes that you took of those tapes?
> A I have handwritten notes of the surveillances, the telephone calls, all of which I have Xeroxed and provided to defense counsel."

Of interest is the following colloquy at instruction settlement time:

> "DEFENSE COUNSEL: One last thing on this thing. I'm not going to make any motions at this time. It's a little late. But I never did receive those handwritten notes. I'd like for my own benefit to read them. I think you asked them to provide them to me and they were never provided.
> THE COURT: They were never provided?
> DEFENSE COUNSEL: No. And the copies of the photographs. I got them once, but I wanted copies of those things and I never got them either. *I don't know if you told him to give them to me or not.*" (Emphasis added).

[2] We are satisfied that the verbal exchanges among counsel to the effect that the tape recordings would not be used as evidence cannot be deemed to reach the level of an actual agreement binding on the Government, especially in light of the fact that defense counsel was informed a week before trial of the Government's intention to introduce the tapes in evidence. The Defense had been in possession of the tape recordings for approximately six months, and defense counsel admitted that he realized he did not have a promise from the Government not to use the tape recordings. (*Cf. United States v. Sweet*, 548 F.2d 198, 203–04 (7th Cir.), *cert. denied*, 430 U.S. 969, 97 S.Ct. 1653, 52 L.Ed.2d 361 (1977).)

The District Court at the pretrial conference, after listening very carefully to the tape recordings, ruled that despite some difficulties, it believed one could pick up and follow what was on them, and concluded that the tape recordings were admissible. The Court further concluded that the jury could utilize the Government prepared transcript under the cautionary instruction.

The Defense correctly contends that they never stipulated to the accuracy or admissibility of the Government's prepared transcript of the tape recordings. They further submit that in light of the discrepancies, confusion, and inaudible portions of the tapes, the admission of the transcript was prejudicial error.

The most recent Ninth Circuit pronouncement on this issue was in *United States v. Turner*, 528 F.2d 143 (9th Cir.), *cert. denied*, 423 U.S. 996, 96 S.Ct. 426, 46 L.Ed.2d 371 (1975), wherein this Court approved the admission of typewritten transcripts to assist the jury in following recordings while they were being played. In *Turner*, this Court stated that there could be no doubt that the transcripts were an accurate rendition of the contents of the tape recordings since the District Court had methodically reviewed many of the tape recordings and corresponding transcripts to ensure their conformity; had made appropriate corrections in the transcripts, including changes requested by the defense; and had given a cautionary instruction to the effect that only the recordings were evidence of the conversations and that the transcripts were provided merely to facilitate listening. Additionally, in *Turner* as in the present case, the Court granted the juror's request, after deliberations had begun, to have certain of the taped conversations replayed, following the same procedure as before and with the specific admonition that only the recordings, not the transcripts, were evidence of the conversations.

In the instant case, the District Court permitted the jury to consider both the tape recordings and transcript only after a careful review of the tape recordings' intelligibility and the transcript's accuracy. Specifically, the Court entertained objections by the Defense as to any alleged errors in the transcript, replayed challenged portions of the tape recordings and corrected the transcript where it appeared that certain relevant words were missing. Furthermore, the District Court clearly instructed the jury, immediately prior to playing the tape recordings, that the document placed before them was a transcription of a portion of what appeared on the tape recordings, and was to be used only as an aid in following the tapes themselves. The Court noted that sometimes the tape recordings were difficult to follow but admonished the jurors that if they followed carefully, with the use of the transcript, it thought they would be able to understand what was being said on the tape recordings and, further, that it was the tape recordings, not the transcript, which were controlling.

[3] We are satisfied that in light of the rationale in *Turner*, the District Court did not commit reversible error in submitting the tape recordings and the Government's prepared transcripts thereof to the jury in the manner in which it was done. Our position is fortified by the testimony of Neuberger, a party to the conversations, corroborating the identity of the parties to and the substance of the conversations taped. Neuberger was subjected to a most searching cross-examination on the subject by the Defense.

The issue is without merit.[2]

Issue 3:

The three grounds in support of the defendants' motion for continuance were that the Government had failed to provide them with (1) copies of Neuberger's prior criminal record; (2) the enticements or promises made to him to secure his testimony; and (3) adequate notice that would allow them to analyze the tape recordings and transcript thereof.

[4] We start with the truism that a motion for a continuance directs itself to the sound discretion of the trial court, and unless an abuse of discretion can be shown, an appellate court may not disturb the trial court's ruling. *United States v. Harris*, 501 F.2d 1 (9th Cir. 1974); *United States v. Bryan*, 534 F.2d 205 (9th Cir. 1976); *United States v. Pratt*, 531 F.2d 395 (9th Cir. 1976).

[5] (1) It has been said that the Government has no discovery obligation under Fed. R.Crim.P. 16(a)(1)(C) to supply a defendant with the criminal records of the Government's intended witnesses. *United States*

2. The appellants rely upon *United States v. Bryant*, 480 F.2d 785 (2d Cir. 1973), and *United States v. Smith*, 537 F.2d 862 (6th Cir. 1976), which appear to support their claim of error; however, in each case the error was held to be harmless. The Defense merely urges that the error cannot be harmless. We believe the District Court in this case gave the appellants more safeguards than were given in *Bryant* or *Smith*.

v. Taylor, 542 F.2d 1023, 1026 (8th Cir. 1976), *cert. denied*, 429 U.S. 1074, 97 S.Ct. 813, 50 L.Ed.2d 792 (1977). We, however, do not reach the issue in this case because it is manifest from the trial record before us that the entire criminal record of Neuberger was supplied by the Government and known to the Defense in adequate time to fully and extensively cross-examine Neuberger on the subject.

[6] (2) On July 26, 1977, the District Court ordered the Government to apprise the Defense in detail of any promises which had been made to Neuberger in exchange for his testimony. On July 27, 1977, in response to the District Court's inquiry, Government counsel stated that he had not had time to complete the task. The District Court instructed the Government to reduce the agreement to writing during the noontime recess and to provide the defense with an accounting. Defense counsel fully utilized such accounting during the extensive cross-examination of Abbey on the following two days. We believe the Government complied with the requirements set forth by the United States Supreme Court in *Giglio v. United States*, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), wherein it was held that nondisclosure of a promise of lenience to a key Government witness violated the due process clause. However, since information concerning "favor or deals" merely goes to the credibility of the witness, it need not be disclosed prior to the witness testifying. *United States v. Mitchell*, 372 F.Supp. 1239, 1257 (S.D.N.Y.1973). *See also United States v. Joseph*, 533 F.2d 282, 286–87 (5th Cir. 1976), *cert. denied*, 431 U.S. 905, 97 S.Ct. 1698, 52 L.Ed.2d 389 (1977); *accord, United States v. McGovern*, 499 F.2d 1140 (1st Cir. 1974).

(3) We are satisfied for the reasons adopted by the District Court at pretrial conference that the ground of inadequate notice of the Government's intention to use the recordings and transcripts has no merit.

We conclude the District Court exercised sound judicial discretion and did not otherwise err in denying the motion for continuance.

Issue 4:

The Defense contends that they were prejudiced at trial by the admission of Neuberger's statements regarding the identity of his narcotics suppliers. Selva failed to object below.

Toward the end of the trial, the District Court made available to the defendants an investigative report prepared by Abbey on July 30, 1976, and upon request, Rinn's counsel was afforded the opportunity to recall Abbey and Neuberger.

Abbey was called as Rinn's witness and the following colloquy ensued:

"Q Did you write a police report in which you indicated that he was able to obtain large quantities of cocaine from people?

A Yes, I believe I did."

Cross-examination began immediately thereafter and Government counsel asked the following questions which were answered over the objections of Rinn's attorney:

"Q Detective Abbey, referring to the references in this report to talking to his people, did he ever tell you who his people were?

A Yes.

• • • • • •

Q Who did Larry Neuberger tell you his people were?

MR. CAPOZZOLA: That asks for hearsay, your Honor, and I object to it. It's rank hearsay.

THE COURT: Overruled.

THE WITNESS: His people were Barry Rinn and Alex Selva."

[7] It is manifest that the defense counsel opened the subject of Neuberger's prior statements to Abbey concerning the identity of his source of cocaine. To the extent that this subject was opened to impeach Neuberger's credibility, *i. e.*, syndicate sources of cocaine, the prosecutor's question about Neuberger's prior identification of the true source was proper rehabilitation.

Rule 801(d)(1) of the Federal Rules of Evidence provides in relevant part that:

"A statement is not hearsay if—

"(1) . . . The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . (B) consistent with his testimony and is offered to rebut an express or implied charge against him of recent fabrication or improper influence or motive . . .".

Furthermore this Court in *United States v. Parr-Pla*, 549 F.2d 660, 663 (9th Cir.), *cert. denied*, 431 U.S. 972, 97 S.Ct. 2935, 53 L.Ed.2d 1069 (1977), held in a similar context that:

"[Rinn's] counsel opened the door to admission of the full conversation by asking [Abbey on direct examination] whether [Neuberger] had made a particular statement in the course of the conversation. *See United States v. White*, 377 F.2d 908, 911 (4th Cir. 1967)."

We conclude that the District Court did not abuse its discretion or otherwise err in overruling the Defense objection to the receipt in evidence of Neuberger's prior identification by name of his cocaine source.

Issue 5:

The Defense contends that the Government's failure to inform them prior to trial of an inculpatory statement made by Selva to Neuberger, which was introduced at trial, constituted a violation of the discovery requirements of Fed.R.Crim.P. 16(a)(1)(A) and constituted reversible error.

The statement in question occurred during the course of the narcotics transaction on October 6, 1976, at which time Abbey, Neuberger, and Selva were present. Abbey had met Neuberger and Selva inside the Rochelle Motel and Bar, and Neuberger stated he had "four pieces" under the dashboard of his car. The three then proceeded out of the bar to the car. It was during this period, when Neuberger was retrieving the paper bag from under the dashboard of his car, that Abbey testified Neuberger looked up at Selva and inquired "Was this bag ripped when you gave it to me?" to which Selva uttered what the Defense now challenges as a previously unknown incriminating response.

Abbey did not testify as to Selva's allegedly incriminating response until nearly the close of the trial when he was called by the Defense. On cross-examination by Government counsel, Abbey was asked about the conversation he had heard between Neuberger and Selva outside Rochelle's Restaurant. Over Defense objections, Abbey was permitted to testify that when Neuberger asked, "Was the bag ripped when you gave it to me?" Selva stated, "No, I don't think so."

The pertinent portion of Fed.R.Crim.P. 16(a)(1)(A) provides:

"Upon request of a defendant the government shall permit the defendant to inspect and copy . . . the substance of any oral statement which the government intends to offer in evidence at the trial made by the defendant whether before or after arrest in response to interrogation by any person then known to the defendant to be a government agent . . ."

It is manifest from the evidentiary record that Selva at the time of his statement was unaware that either Neuberger or Abbey was in fact a Government agent. Furthermore, Selva was not then under "interrogation" within the meaning of Rule 16(a)(1)(A) by either Neuberger or Abbey.

[8] We conclude that the District Court did not abuse its discretion or otherwise err in admitting into evidence Selva's reply.

The several judgments of conviction and sentences entered by the District Court on September 12, 1977 are each affirmed.

AFFIRMED.

Appendix B

No. 77-3339, United States of America, Plaintiff-Appellee, v. Barry Rinn and Alex Selva, Defendants-Appellants.

Order

December 12, 1978, the Petition for Rehearing filed by the appellants Rinn and Selva has been considered and is denied.

Before: ANDERSON and HUG, Circuit Judges, and EAST,* Senior District Judge

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix C

No. 77-3339, United States of America, Plaintiff-Appellee, v. Barry Rinn and Alex Selva, Defendants-Appellants.

Order

January 18, 1979. The motion of appellants to recall and stay the issuance of mandate in this cause is GRANTED pending the timely filing of a petition for writ of certiorari with the United States Supreme Court. This stay shall remain in effect for a period of 30 days or until such time as the United States Supreme Court takes final action on said petition.

Before: ANDERSON and HUG, Circuit Judges, and EAST,* District Judge

*The Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

Appendix D

18 U.S.C., Section 3500 (Jencks Act)

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(d) If the United States elects not to comply with an order of the court under subsection (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means -

(1) a written statement made by said witness and signed or otherwise adopted or approved by him;

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an

oral statement made by said witness and recorded contemporaneously with the making of such oral statement; or

(3) a statement, however taken or recorded, or a transcription thereof, if any, made b y said witness to a grand jury.